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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 1268

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, a public body corporate, *et al.*,
Petitioners,

VERSUS

ROBERT L. DOWELL and VIVIAN C. DOWELL, Infants, by A. L. Dowell, their Father and Next Friend, EDWINA HOUSTON HELTON, a minor, by her Mother, Gloria Burse, and GARY RUSSELL, a minor, by his Father, George Russell,
Respondents.

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Every statement, whether that of a petitioner or respondent, and whether long or short, ought to be both complete and fair. Oftentimes fairness requires completeness. Respondents' is deficient in this respect.

As pointed out in the petition, there were two opinions of the District Court. One was filed on July 11, 1963 (R. 50). In the order and decree which was incorporated in that opinion, the "minority to majority" transfer policy then in effect was struck down, and certain directives were issued. That opinion and decree are not here for review. In the opinion which is, the Court finds and states:

"The School Board has instituted the changes in its policy and administration required by this Court's order of July, 1963, and has in good faith attempted to administer the school system in accordance with these changes" (R. 149).

Notwithstanding this, respondents at page 10 of their brief quote a statement contained in the 1963 opinion:

"* * * that evidence of gerrymandering or otherwise of maintaining separate and distinct schools for Negroes and schools for whites can be seen in a review of the testimony" (R. 77).

Fairness would seem to require that the Court's actual finding in that regard that:

"There is insufficient evidence before the Court to find there has been gerrymandering of the Negro school districts as of this date, and the matter of gerrymandering of necessity is a matter of which proof will be heard at some early date" (R. 79),

should have been included. The record is devoid of any further proof or finding regarding gerrymandering, and at the final evidentiary hearing in August of 1965 the issue was not raised. There is therefore no justification for referring to that subject at all.

The truth of the matter is that immediately after *Brown*, the Board accepted that decision for what it was, and unlike the Boards in many other states, instead of adopting a plan contemplating the desegregation of schools on a one grade per year scheme, promptly did away with the dual system then in effect and provided a unitary desegregated system. The testimony of school officials in this respect is uncontradicted. The Superintendent of

Schools, after referring to a resolution adopted by the Board on August 1, 1955, testified:

> Q. "Do you know what was done by the Board at that time in addition to the passage of the resolution to carry out the decision of the Supreme Court?
>
> A. Yes, sir.
>
> Q. What was it?
>
> A. It was a redrawing of the attendance areas of the school district so they could conform to a single school district rather than the dual system that had existed previously" (R. 171).

Furthermore, a member of the School Board testified at a hearing on August 8, 1963:

> "I don't believe there has been actually any case, nor do I know of any case, where any child has attended, has been refused attendance in the area for the school where he resides since 1955" (R. 189).

At page 21 of their brief, respondents quote a statement contained in the report of the experts concerning employment of teachers, and then observe that the policy statement of the Board was susceptible to the interpretation that Negro teachers would be assigned to schools with all-white faculties only when they are "ready" to accept Negro teachers.

Even if the policy statement was susceptible to the meaning suggested, such susceptibility was completely removed, not by what the Board had said but by what it actually did. In addition to redrawing attendance area lines, it assigned Negro teachers to a number of integrated

schools so that although at the end of 1963 there was perhaps only one Negro teacher in schools attended by both white and Negro children, by the end of school year 1965-1966 there would be somewhere between 50 and 55 (R. 355). Negro teachers were also assigned to six all-white schools (R. 354) and a change was made in the personnel who handled applications for transfers by which a Negro was assigned to assist in the processing of such applications (R. 338).

At this point it is worthy of note that at the final hearing before the District Court no effort was made to demonstrate a single instance of discrimination, either in pupil placement or faculty assignments, because of race.

ARGUMENT

1. There is a clear-cut and irreconciliable conflict between the decision of the court below and those of other circuits.

Under a topical heading on page 37 of their brief, respondents first assert that "There is no conflict of decision," and then state that the decision of the court below is in accord with "recent major decisions of the other circuits." Much emphasis is placed upon the recent decision of the Fifth Circuit in *United States, et al.* v. *Jefferson County Board of Education, et al.*, 372 F.2d 836. That decision furnishes support for respondents' position here in some respects. However, it is interesting to note that even it, although extremely critical of school officials in the circuit and of other courts which have reached contrary results, does not even approach in scope or extent the relief granted by the District Court in this case.

All the Fifth Circuit did was to order the adoption of a freedom of choice plan and faculty integration in the sense that the faculty of no school should be comprised entirely of either Negroes or whites. It did not concern itself with the recasting of school attendance lines nor infringe upon the power and duties of elected school officials in determining the use to which existing facilities should be put. Neither did it order faculty integration on a fixed percentage ratio. On the contrary, the court approved the statement that:

> "The law does not require a maximum of racial mixing or striking a racial balance accurately reflecting the racial composition of the community or the school population. It does not require that each and every child shall attend a racially balanced school." Footnote 5, page 847.

Regardless of this, Jefferson County simply provides another reason why this Court should review the action of the District Court here and set at rest once and for all the uncertainty and confusion which exists.

Respondents, as they must if they really believe that no conflict exists, attempt to distinguish *Bell*, *Downs* and *Kelley* from this case. This they seek to do with *Downs* and *Bell* by asserting that the alleged segregation in them was *de facto* rather than *de jure*. No such attempt is made with *Kelley* for obvious reasons.

It is true, of course, that in Oklahoma and many other states there existed, prior to *Brown*, segregation imposed by law. However, it cannot be said that since *Brown*, particularly in the light of the action of the Board of Education, *de jure* segregation existed in Oklahoma City. In-

deed, the School Board here quickly accepted that decision as the law and set about implementing it. Tangible evidence of this is found in the fact that the School Board promptly redrew attendance area lines so that there was no suggestion of duality, and instead of proposing a grade by year plan of desegregation, promptly threw all schools open to pupils, Negro or white, who resided in the areas served by them.

In *Downs* it was pointed out that, "There is, to be sure, a racial imbalance in public schools of Kansas City." This is true in Oklahoma City. It was also pointed out that in Kansas City, "* * * the staffs of the various schools are either all white, as in the case in white and integrated schools, or all Negro." This was true in Oklahoma City until the School Board, in a good faith effort to implement the decision in *Brown*, made the teacher assignments reflected by the record. The court below, when it decided *Downs*, concluded:

> "* * * that the decisions in Brown and the many cases following it do not require a school board to destroy or abandon a school system developed on the neighborhood school plan, even though it results in a racial imbalance in the schools, where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation."

Actually, the only difference between *Downs* and this case is that in *Downs* the trial court properly found for the School Board. It is evident that the court below, when it decided *Downs*, did not do so on the basis that the alleged segregation was *de facto*, for it said:

"Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them. Kelley v. Board of Education of City of Nashville, supra; Stell v. Savannah-Chatham County Board of Education, 5 Cir., 333 F. 2d 55; Evers v. Jackson Municipal Separate School District, 5 Cir., 328 F. 2d 408; Boson v. Rippy, 5 Cir., 285 F. 2d 43; Holland v. Board of Public Instruction, 5 Cir., 258 F. 2d 730; Avery v. Wichita Falls Independent School District, 5 Cir., 241 F. 2d 230, cert. denied, 353 U.S. 938, 77 S. Ct. 816, 1 L. Ed. 2d 761; Bradley v. School Board of City of Richmond, Virginia, 4 Cir., 317 F. 2d 429; Jeffers v. Whitley, 4 Cir., 309 F. 2d 621."

It is also evident that that Court considered *Bell*, whether a *de facto* or *de jure* case, controlling, when it said:

"Moreover, the question was conclusively answered in Bell v. School City of Gary, Indiana, 7 Cir., 324 F.2d 209, 213, cert. denied, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216, where the court held that ' * * * "there is no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils." ' "

The situation in Oklahoma City following *Brown* is the same as that which existed in the City of Cincinnati. The Sixth Circuit, in *Deal, et al.* v. *The Cincinnati Board of Education, et al.*, 369 F.2d 55, described it thus:

> "In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not. In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and they can move into the neighborhood district of such a school. This situation is far removed from Brown, where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school, prejudice. We read Brown as prohibiting only enforced segregation."

While freely conceding that prior to *Brown* there existed in Oklahoma "enforced segregation," since that time the right of a Negro in Cincinnati and a Negro in Oklahoma City education-wise has been identical. This right is, as the Sixth Circuit expressed it, to have "equal educational opportunity."

Although no real effort is made to distinguish Kelley, it is interesting that the Sixth Circuit pointed out, as did the District Court here, that:

> "Negroes usually live, as a group, in certain areas, largely because of the fact that residential restrictions

in the way of restrictive covenants running with the land, have, for many years, made it impossible for them to live elsewhere, and as a result, especially in cities of the North, they have been confined to run-down residential areas with the poorest accommodations, at high rents. This case is not concerned with this problem, however, but reference is made to the fact as indicating the reason why schools in certain areas are attended wholly by Negro children, both in states where, heretofore, segregation has been sanctioned by state law, as well as in states where, theoretically, segregation has been condemned."

Covenants such as those mentioned have long been invalidated by our courts and are no longer effective in Oklahoma.

When the first *Brown* case was here, several questions were propounded by the Court, and the cases which came from Kansas, South Carolina, Virginia and Delaware were restored to the docket for further argument on questions 4 and 5. Question 4 dealt with the extent of relief which should be granted to implement the conclusion " * * * that in the field of public education the doctrine of 'separate but equal' has no place." The first part of the question was:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, * * * "

It would seem that the Court felt at that time that the maximum relief which could be granted would be to forth-

with require the admission of Negro children "within the limits set by normal geographic school districting" to schools of their choice. After reargument, the cases were remanded to the District Court for the purpose of formulating proper decrees.

It is the position of petitioners that without the entry of any court decree, and long before this case was filed, they voluntarily conferred the maximum relief contemplated by *Brown*.

There is nothing in either *Brown* opinion which suggests that this Court viewed the cases from Kansas and Delaware as involving any different constitutional questions than those from Virginia and South Carolina. The question is whether or not, after *Brown*, the action or inaction of the School Board violated the rights of Negro children in Oklahoma City to "equal educational opportunities."

2. The importance of the case.

In the second *Brown* case, District Courts were ordered "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis, with all deliberate speed, the parties to these cases."

The real question, then, is whether the order of the District Court here exceeds in scope the directives of *Brown*. Apparently the meaning of the words "on a racially nondiscriminatory basis" has been obscure, and they have been variously construed by numerous courts. It was suggested in the petition that some of the confusion, at least, in applying varying definitions, has resulted from the ill-

advised use of such terms as "discrimination," "segregation," "desegregation," and "integration." The Fifth Circuit observed in *Jefferson County*:

> "The Supreme Court did not use either term, desegregation or integration, in Brown. * * * For ten years after Brown the Court refrained from using the terms 'integration' or 'integrated,'"

and then called attention to the fact that in *Griffin* v. *County School Board of Prince Edward County*, 375 U.S. 391, 84 Sup.Ct. 400, 11 L.Ed.2d 409, the Court noted that:

> "The Board of Supervisors decided not to levy taxes or appropriate funds for integrated public schools * * *." Footnote 5, page 846.

It is, of course, unknown whether the Court deliberately refrained from the use of either word, or whether it was pure happenstance. This case affords a good setting in which to dispel all doubt in this regard and pronounce the true teaching of *Brown*.

CONCLUSION

For the reasons stated in the petition and in this reply, the petition should be granted.

Respectfully submitted,

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